Supreme Court, U.S.
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No. 00-1028

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

MATTHEW REINER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF

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Petitioner, the State of Ohio, respectfully submits this Reply to the Brief in Opposition filed by Respondent, Matthew Reiner. Petitioner files this brief under Rule 15.6 of the Rules of this Court.

REASONS TO GRANT THE WRIT

In his Brief in Opposition, Respondent claims that the Ohio Supreme Court's ruling rests solely on an independent and adequate state ground and that the Ohio Supreme Court's decision is consistent with Fifth Amendment law. Petitioner responds to these claims in succession.

I.

THE OHIO SUPREME COURT'S DECISION DOES NOT REST ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

The thrust of Respondent's Brief in Opposition is that the Ohio Supreme Court's ruling "presents only an issue of state law: the meaning and application of the Ohio statute authorizing the grant, by a state court, of immunity to a witness in a state-court proceeding." Resp. at 1. Respondent supports this position by claiming that Petitioner advances only two basic arguments and that both are exclusively state-law claims. See Resp. at 2:

> Here, the State advances two core claims: *first*, that the Ohio Supreme Court improperly concluded that Respondent had standing to

> challenge the grant of immunity under the state statute (Pet. at 12); and *second*, that the Ohio Supreme Court used the wrong standard of review on appeal (Pet. at 21).

He forgot one. Petitioner also claimed that the Ohio Supreme Court's ruling all but required witnesses first to prove the very hazard against self-incrimination from which they sought protection.[1] As reflected by the Ohio Supreme Court's own comments, this constituted an unprecedented narrowing of a witness's Fifth Amendment privilege: "Because Susan Batt did not have a valid Fifth Amendment privilege, the trial court's grant of immunity was erroneous and unlawful." App. at 25. It is clear from these statements that the Ohio Supreme Court based its decision on the Fifth Amendment to the United States Constitution.

Until this Court decided *Michigan v. Long* (1983), 463 U.S. 1032, there was no uniform, predictable manner in which to determine whether a given case rested on adequate and independent state grounds:

> Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue.

463 U.S. at 1038 (footnote omitted).

Long ended this state of flux and announced the "plain-

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[1]Pet. at 20.

statement rule,"[2] under which this Court can now review a case even absent the exclusive, direct application of federal law:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1040-1041. As *Long* observed, if a state court wanted to base its ruling exclusively on state-law grounds, it need only have done so in its opinion. 463 U.S. at 1041.

Subsequently, *Pennsylvania v. Muniz* (1990), 496 U.S. 582, applied this liberal standard in the very context of the privilege against self-incrimination. Although the Pennsylvania state appellate court premised its ruling entirely on a provision of that state's constitution, this Court nonetheless granted certiorari because the state court interweaved the matter with federal law by explaining that the state constitutional provision "'offers a protection against self-incrimination identical to that provided by the Fifth Amendment.'" 496 U.S. at 588, n.4. "The decision therefore does not rest on an independent and adequate state ground." *Id.*, citing *Long*.

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[2]463 U.S. at 1041.

The cases on which Respondent relies either predate *Long* or are inapposite. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Central Union Telephone Co. v. Edwardsville*, 269 U.S. 190 (1925); *Cooper v. California*, 386 U.S. 58 (1967); and *Gurley v. Rhoden*, 421 U.S. 200 (1975), for instance, predate *Long* and *Muniz*. And *Asarco, Inc. v. Kadish*, 290 U.S. 605 (1989), undercuts, rather than bolsters, Respondent's position because it, as is the Ohio Supreme Court's ruling, was based entirely on federal grounds.

Here, similarly, the Fifth Amendment to United States Constitution is involved because the Ohio Supreme Court premised its ruling exclusively on it. See App. at 25: "Because Susan Batt did not have a valid Fifth Amendment privilege, the trial court's grant of immunity was erroneous and unlawful." In fact, before filing this brief in opposition, Respondent had consistently relied on the Fifth Amendment. See App. at 18:

> Defendant's cross-appeal challenges the validity of the trial court's grant of immunity to Susan Batt. The defendant alleges that the grant of transactional immunity pursuant to R.C. 2945.44 was unlawful because Susan Batt did not have a valid Fifth Amendment privilege against self-incrimination upon which to base the immunity. Defendant claims that, as a consequence, his rights were prejudiced. We agree.
>
> The Fifth Amendment declares that 'no person ... shall be compelled in any criminal case to be a witness against himself ... .'

Respondent is now entirely avoiding any mention of

the Fifth Amendment. This eleventh-hour about-face should be rejected. Accordingly, the Ohio Supreme Court's ruling does not rest on independent and adequate state grounds.

II.

THE OHIO SUPREME COURT'S APPLICATION OF FIFTH AMENDMENT LAW IS ALTOGETHER INACCURATE.

The Fifth Amendment privilege against self-incrimination is broad and attaches not only where the question calls for the admission of a crime or where it asks the witness to provide a link in the chain of evidence needed to prosecute. Rather, the privilege attaches even if a question calls for an answer that ***can*** be self-incriminating:

> A witness risks a real danger of prosecution if an answer to a question, on its face, calls for the admission of a crime or requires that the witness supply evidence of a necessary element of a crime or furnishes a link in the chain of evidence needed to prosecute. In *Hoffman*, the Supreme Court held that a real danger of prosecution also exists where questions, ***which appear on their face to call only for innocent answers***, are dangerous in light of other facts already developed. In such a situation a witness bears no further burden of establishing a reasonable cause to fear prosecution beyond asserting the privilege and identifying the nature of the criminal charge or supplying sufficient facts so that a particular criminal charge can reasonably be

> identified by the court. The witness has met his burden and the court does not need to inquire further as to the validity of the assertion of the privilege, if it is evident from the implications of a question, in the setting in which it is asked, that a responsive answer ***might*** be dangerous to the witness because an injurious disclosure ***could*** result.

In Re: Morganroth v. Fitzsimmons, 718 F.2d 161, 167 (6th Cir. 1983) (emphasis added), citing *Hoffman v. United States*, 341 U.S. 479 (1951).

Respondent acknowledges this wide scope of protection: "A witness may assert a Fifth Amendment right '[*sic*] only when the danger of incrimination is real and appreciable." Resp. at 7. But he wrongly claims that the Ohio Supreme Court followed this liberal approach. Instead, that tribunal expressly ruled that Ohio's immunity statute applied only upon a showing that "the witness's testimony ***would be*** self-incriminating." App. at 22-23 (emphasis added). To be sure, from Chief Justice Marshall's opinion in *United States v. Burr*, 25 F.Cas. 38 (Cir. Ct., D. Va. 1807) to present, a witness cannot invoke the privilege absolutely. The court must be assured of a proper basis for the claim, but in determining the proper basis, no court has ever required the witness personally to disclose the information which the privilege exists to protect. If such were ever done, the privilege would no longer exist. That is why an inquiry into the existence of the privilege has always been limited to the scope of the questions and the setting and context in which they are asked.

The proper state of the law is that the privilege attaches upon the showing that, "in light of other facts already developed,"[3] the witness's testimony ***could be*** self-incriminating, *i.e.*, that, "in the setting in which [the question] is asked, that a responsive answer ***might*** be dangerous to the witness because an injurious disclosure ***could*** result."[4] What Respondent might blithely dismiss as a semantic lapse is, instead, the fatal flaw in the Ohio Supreme Court's ruling that compels this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] *Morganroth*, 718 F.2d at 167 (emphasis added), citing *Hoffman*.

[4] *Id.* (emphasis added).